

Transmitted Electronically

29 October 2014

Mr. Tommy Thomas, Contracting Officer
General Services Administration
OASIS Program Management Office
819 Taylor Street
Fort Worth, TX 76102

Subject: Response to FOIA Request GSA-2015-000031 under the OASIS Master Contract

Dear Mr. Thomas:

In response to your email dated October 23, 2014 on behalf of the General Services Administration (GSA), you requested that we particularize our objections to the release of Northrop Grumman Systems Corporation's ("Northrop Grumman") OASIS rates as provided in Attachment J.2 under our OASIS Contracts. Northrop Grumman considers its pricing and rate information to be highly business sensitive and company proprietary and release of the rates could result in significant harm to Northrop Grumman from a competitive standpoint. This letter provides our factual and legal justifications for withholding from public release our OASIS rates and sets forth Northrop Grumman's timely objection. Please note that if GSA plans to release any other items other than the documents referenced above, Northrop Grumman requests the opportunity to comment likewise before any public release.

The proprietary pricing information sought by GSA for release by the subject FOIA request is confidential and constitutes commercial and financial information that is expressly exempt from release under FOIA, 5 U.S.C. § 552(b)(4) ("Exemption 4). Such pricing information constitutes confidential commercial and financial information of Northrop Grumman within the protections of Exemption 4 and the Trade Secrets Act, the disclosure of which would cause substantial competitive harm to Northrop Grumman.

The FOIA request seeks information regarding the negotiated rates. As this information provides any competitor of Northrop Grumman's an essential component of our pricing strategy used on this and other proposals, we believe that it is proprietary and that disclosure of Northrop Grumman proprietary information of this nature outside of Northrop Grumman and/or the Government would provide Northrop Grumman's competitors with an unfair competitive advantage and could seriously damage Northrop Grumman's ability to successfully compete for other government programs. The disclosure of such information would permit competitors of Northrop Grumman and its subcontractors to estimate, with substantially greater accuracy than can be done from publicly available information, the costs and rate structure of Northrop Grumman.

For reasons presented in this response, we consider this information confidential and representative of the type of commercial and financial information that is expressly exempt from release under FOIA, 5 U.S.C. 552(b)(4) (Exemption 4).

By releasing this information, a potential competitor could estimate the rates at which we perform the associated services. Competitors could therefore use such information to underbid proposals and bids submitted by Northrop Grumman, in response to additional proposal requests on the subject contract and in the broader competitive arena. Disclosure of confidential information of the type objected to above would also permit other customers of Northrop Grumman and its subcontractors to have greater insight into costs and pricing strategies that would enable such customers to more effectively negotiate lower prices from Northrop Grumman and its subcontractors. Release of such information could also impair the

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amount and quality of pricing information that Northrop Grumman and other bidders would be willing to supply the Government in future contract proposals. Finally, release of Northrop Grumman proprietary information is prohibited by the Trade Secrets Act (18 U.S.C. § 1905).

The Northrop Grumman proprietary information at issue here is confidential and proprietary to Northrop Grumman in that it reflects Northrop Grumman's business strategy to accomplishing this work and similar work – including proprietary pricing developed by Northrop Grumman – and, as such, includes proprietary information that Northrop Grumman will use again in future competitions. The release of Northrop Grumman proprietary information would reveal these fundamental components of Northrop Grumman's pricing. Northrop Grumman has taken steps to maintain the confidentiality of such information and prevent its release to the public. New employees of Northrop Grumman are required to sign, as a condition of employment, a confidentiality agreement in which the employee agrees not to divulge Northrop Grumman proprietary information of precisely the sort at issue here. When employees terminate their employment, documents that they wish to take with them are reviewed to ensure that they do not contain Northrop Grumman proprietary information. When Northrop Grumman shares proprietary information with other companies in the context of proposals, teaming arrangements, or the like, such disclosure is made subject to the terms of carefully negotiated non-disclosure agreements. When Northrop Grumman submits proprietary information to the Government, it does so only after affixing an appropriate protective legend. As this discussion makes clear, Northrop Grumman zealously safeguards Northrop Grumman proprietary information.

The courts have upheld the protection from disclosure of pricing information contained in government contracts and proposals when the information sought involves pricing information at a level of detail beneath the total price of the contract. In *McDonnell Douglas Corp. v. NASA*, 180 F.3d 303 (D.C. Cir. 1999) McDonnell Douglas, in reliance on exemption 4 of the FOIA and the Trade Secrets Act, had objected to the release of launch service prices, cost figures for specific launch service components and overhead, labor rates, profit figures and percentages and line item prices as being confidential commercial or financial information. NASA determined that disclosure of labor rates, overhead factors, profit information and launch service cost figures was likely to cause substantial competitive harm and that this information would not be released. However, with regard to individual line item pricing NASA, rejected the McDonnell Douglas' position that release of this information would allow competitors to underbid McDonnell Douglas and would allow its commercial customers to negotiate more effectively and "ratchet down" its rates. Reversing the trial court, the D.C. Circuit Court of Appeals upheld McDonnell Douglas's objection to the disclosure of such line item prices, concluding that such prices were confidential commercial or financial information. The court stated that "both of the reasons McDonnell Douglas advanced for claiming its line item prices were confidential information are indisputable" and that under present law McDonnell Douglas "has every right to insist that its line item prices be withheld as confidential" and that "if commercial or financial information is likely to cause substantial competitive harm to the person who supplied it, that is the end of the matter, for the disclosure would violate the Trade Secrets Act."

A similar conclusion was reached by the court in *MCI Worldcom, Inc. v. GSA*, 163 F. Supp. 2d 28 (D.D.C. 2001) where the Court upheld a request for protection of tables containing pricing elements as being protected under Exemption 4 of the FOIA. There the court found that since the pricing elements and components sought to be protected were "not separately purchased, ordered and billed to the government" they did not constitute the price for a good or service and that the disclosure of such pricing elements would cause "precisely the injuries that led the [D.C.] Circuit [in *McDonnell Douglas*] to declare that line item pricing was confidential information and not disclosable." 163 F. Supp.2d at 36. As in the *McDonnell Douglas* and *MCI* cases, the pricing information identified by Northrop Grumman that is sought by the subject FOIA request should not be disclosed to the extent that such information goes beyond the total price of the contract. Disclosure of the more detailed pricing components sought by the subject FOIA request will cause precisely the same types of competitive harm to Northrop Grumman and its subcontractors as the *McDonnell Douglas* and *MCI* courts found would have resulted from the release of the pricing information sought in those cases. As indicated by

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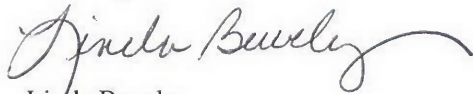
another recent decision by the D.C. Circuit, *McDonnell Douglas Corp. v. U. S. Department of the Air Force*, 375 F.3d 1182 (D.C. Cir. 2004), each FOIA request requires individualized analysis as to whether release of the requested pricing information would cause competitive harm to the party that supplied it to the government.

Finally, release of Northrop Grumman proprietary information is prohibited by the Trade Secrets Act, 18 U.S.C. §1905, which makes it unlawful for a Government employee to disclose to any third party any trade secret, confidential or financial information that comes into that employee's possession through performance of his or her duties, unless such disclosure is authorized by law. As discussed above, disclosure of the Northrop Grumman proprietary information is not authorized by law. The FOIA statute itself and the settled decisional law interpreting that statute make it clear that the Northrop Grumman proprietary information cannot be disclosed under FOIA. Accordingly, any disclosure would constitute a per se violation of the Trade Secrets Act.

Thank you for this opportunity to state Northrop Grumman's position on this FOIA request. Northrop Grumman believes that its objection is entirely reasonable, factual, and in the best interests of the Government. Applicable statutory and decisional law demonstrates that Northrop Grumman has properly objected to the release of the Northrop Grumman proprietary information and that the Government cannot disclose Northrop Grumman proprietary information to any party outside of the Government. In the event that you decide to release any portion of the information that Northrop Grumman claims to be exempt from release, Exec. Order No. 12,600, 52 Fed. Reg. 23781-82 (1987) directs agencies to provide the submitter of information reasonable notice of contemplated release. Therefore, before any release, Northrop Grumman requests advance written notice of such contemplated release, and the reason for rejecting our claim that the information is proprietary and non-releasable.

Please note that Northrop Grumman also objects to the release of this letter in its entirety both for this and future FOIA requests. Should you have any questions, I can be reached through phone at (703) 556-1631, or through electronic mail at Linda.Bavely@ngc.com.

Sincerely,

A handwritten signature in cursive script, reading "Linda Bavely".

Linda Bavely
Contract Manager